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Nos. 84-621, 84-633, 84-641

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
EDWARD K. WHEELER, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY AND THE WESTERN PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS

WILLIAM J. MCDONALD
345 Park Avenue
New York, New York 10154

JAMES V. DOLAN
PAUL A. CONLEY, JR.
1416 Dodge Street
Omaha, Nebraska 68179

CHARLES A. MILLER*
GREGG H. LEVY
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Corporation, *et al.*

* Counsel of Record

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Respondents Union Pacific Corporation, Union Pacific Railroad Company (collectively, "Union Pacific"), Missouri Pacific Corporation, Missouri Pacific Railroad Company (collectively, "Missouri Pacific") and The Western Pacific Railroad Company, intervenors in the court below and referred to herein as "respondents," submit this brief in opposition to the petitions for certiorari filed by Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (collectively, "KCS"), the Brotherhood of Maintenance of Way Employes

and various other rail labor unions (collectively, "the labor parties"), and Edward K. Wheeler.[1]

STATEMENT OF THE CASE

On December 22, 1982, after Chief Justice Burger had denied several applications for stay,[2] Union Pacific acquired control of Missouri Pacific and Western Pacific, and thereby created a single, consolidated railroad.[3] Since then, the facilities, operations and managements of the three companies have been integrated, and the consolidated system has been offering "single-system service" to shippers in the western United States.

These transactions were authorized by an order and decision of the Interstate Commerce Commission, served October 20, 1982, which petitioners challenged unsuccessfully below.[4] App. 39a *et seq.*; see generally 49 U.S.C. § 11343 (Supp. IV 1980), App. 639a. After extensive administrative proceedings, in which the Antitrust Division of the Department of Justice, the Department of Transportation and numerous state governments participated, the ICC determined in a 360-page decision that the consolidations, as conditioned, would be in the public

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[1] Respondents' parents, subsidiaries and affiliates are identified in the Appendix to this brief.

[2] Atchison, Topeka and Santa Fe Railway Co., *et al.* v. Interstate Commerce Commission, Nos. A-544, A-545 and A-546 (Dec. 22, 1982) (Burger, C.J.). That decision was subsequently embraced by the entire Court. See 51 U.S.L.W. 3507 (U.S. Jan. 11, 1983).

[3] Union Pacific obtained 77 percent of Western Pacific's stock in a tender offer of $20 per share that expired in March 1980; those shares remained in an independent voting trust until December 22, 1982. (Union Pacific had previously acquired 9.9 percent of Western Pacific's stock in open market purchases.) In May 1983, Union Pacific acquired the balance of the outstanding Western Pacific stock for $20 per share through a merger approved by the ICC. Union Pacific acquired Missouri Pacific through a stock exchange approved by the companies' shareholders in April 1980.

[4] The ICC's principal opinion was joined by five of the ICC's six Commissioners. Chairman Taylor and Commissioner Simmons also filed concurrences indicating their approval notwithstanding their preference for conditions sought by the Missouri-Kansas-Texas ("MKT") and Burlington Northern railroads that did not receive majority support. Neither of those railroads submitted briefs below in opposition to the ICC's order.

interest, and it found substantial public benefits arising from better service, more efficient operations, enhanced competition, improved job security for employees, and higher levels of employment. *E.g.*, App. 84a *et seq.* The ICC also determined that the terms of the transactions were fair to respondents' shareholders. *E.g.*, App. 298a *et seq.*[5] The ICC subsequently denied several requests for rehearing, and it actively opposed all efforts to stay the effectiveness of its order.[6]

The various petitions for review of the ICC's order were consolidated for decision in the D.C. Circuit Court. The transactions were consummated several weeks later, after that court (Circuit Judges Mikva and Scalia) and Chief Justice Burger had denied petitioners' requests for stay. Thereafter, in a *per curiam* opinion, Circuit Judges Wright, Mikva and Bork affirmed the Commission's decision in all relevant respects.[7]

Summary Of Petitions

Petitioners raise here several discrete issues, none of which was a significant factor in the proceedings before the ICC or the

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[5] The Commission imposed several conditions to maintain the level of competition in the new system's market areas (trackage rights for the Southern Pacific, Denver & Rio Grande Western ("DRGW") and MKT railroads), and it approved respondents' settlements with Conrail and the Chicago & North Western Transportation Company.

[6] The ICC's approval of the consolidations was consistent with recent federal initiatives encouraging end-to-end rail consolidations. For example, the Railroad Revitalization and Regulatory Reform Act of 1976 endorsed "efforts to restructure [the national railway] system on a more economically justified basis." Pub. L. No. 94-210, § 101(a)(2), 90 Stat. 31, 33 (1976). This legislation was followed by the ICC's development of general policy statements reflecting the congressional policy, and by the ICC's subsequent approval of several rail consolidations similar in nature and scope to those approved here. See Railroad Consolidation Procedures, 359 I.C.C. 195 (1978); Railroad Consolidation Procedures, General Policy Statement, 363 I.C.C. 784 (1981).

[7] The Court remanded to the ICC for further consideration of one discrete issue. See App. 32a-33a. That issue concerned the Commission's denial of DRGW's request for a condition affording it "independent rate-making authority" over the Western Pacific portion of the consolidated system. After additional briefing, that issue is now awaiting decision by the ICC.

affirmance below of the Commission's decision. While ten railroad protestants challenged the transactions at various stages below, only KCS has sought review of the Court of Appeals' decision. A highly successful railroad not threatened by the consolidations (App. 243a), KCS has acknowledged that its objective in the proceedings was "personal aggrandizement at the expense of the merging parties."[8] It asked the Commission to expand its system by imposing as conditions to the consolidations trackage rights over nearly 1,000 miles of Missouri Pacific lines; KCS admitted that such rights were totally unrelated to the competitive impact of the consolidations. See App. 28a. The ICC's denial of that request is the principal focus of KCS' petition.

The labor parties' interest here is no more compelling. The ICC found that the approved transactions "will directly benefit labor both by producing a substantial net increase in existing and future employment opportunities and by increasing the job security of their present employees" (App. 277a); nonetheless, the Commission imposed very generous labor protective conditions that obviate any adverse impact of the approved transactions on respondent employees.[9] App. 281a. The D.C. Circuit Court affirmed the Commission's refusal to expand the scope of that labor protection in a decision that recognized the 44 years of consistent ICC decisions on this issue. The Second, Fifth and Seventh Circuit Courts have reached the same result in the last five years.

While several dissenting shareholders challenged the transactions before the ICC, only petitioner Wheeler, a dissenting Western Pacific shareholder, continues to challenge the ICC's

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[8] Transcript of ICC Oral Argument, at 180-81.

[9] These conditions afford adversely affected employees generous displacement allowances, dismissal allowances and fringe benefits for an extended period after implementation of the transactions. See generally, New York Dock Ry.—Control—Brooklyn Eastern District, 366 I.C.C. 60 (1979); Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653, 664 (1980).

finding that $20 per share was a fair price for Western Pacific. Wheeler makes this challenge notwithstanding (1) that the D.C. Circuit Court, after a thorough and detailed analysis, squarely rejected each of his arguments; (2) that the $20 price represented a substantial premium over the market price of Western Pacific stock at the time of the acquisition agreement; (3) that the ICC had valued Western Pacific at 50 percent of the offering price only one year before the acquisition agreement; and (4) that appraisal proceedings addressing the value of Western Pacific's stock have been initiated in Delaware state court by dissenting Western Pacific shareholders.

SUMMARY OF ARGUMENT

The decision below is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented, none of which involves an unsettled question of federal law. Accordingly, the petitions fail to satisfy this Court's traditional criteria for review.

While KCS contends that the Interstate Commerce Commission should "act as a roving ombudsman restructuring railroads on its own" whenever a consolidation application is submitted for review (see p. 7, below), its position has absolutely no legal support. The D.C. Circuit Court correctly determined that the ICC's rejection of KCS' request for a market extension unrelated to the approved transaction was well within the scope of its discretion.

The ICC's Order approving the transactions was endorsed by a majority of the ICC's six Commissioners. The concurring votes of two Commissioners—both of whom expressly approved the ICC's Order in their separate concurring opinions—cannot be read as constructive "dissents," as KCS contends.

The D.C. Circuit Court properly declined KCS' invitation to substitute its judgment for the judgment of the Commission on a variety of highly technical, quantitative issues. The court below expressly and properly applied the standard of review prescribed by the Administrative Procedure Act and this

Court's precedents. Its affirmance of the Commission's calculation of the public benefits generated by the consolidations does not warrant further review.

Pursuant to its statutory obligations, the ICC imposed for the benefit of adversely affected applicant employees very generous labor protective conditions. The ICC was not obligated to impose protective conditions for the benefit of other railroads' employees adversely affected by the approved transactions. The Second, Fifth, Seventh and D.C. Circuit Courts have all recently held that the conditions imposed by the ICC fully satisfy the governing statute. There is no basis for this Court to review that consistent line of Circuit Court precedent.

The factual issue presented by Wheeler—whether $20 per share was a reasonable price for Western Pacific—does not warrant further review in light of the Court of Appeals' holdings (1) that the ICC's "methodology of valuation is reasonable," (2) that the ICC's "conclusions are supported by substantial evidence in the record," and (3) that the transaction was the result of "arm's length negotiations." App. 36a-37a.

REASONS FOR DENYING THE WRIT

None of the issues presented satisfies this Court's traditional criteria for certiorari. The D.C. Circuit Court's decision is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented. Moreover, on almost every issue, the ICC decision affirmed by the Court of Appeals followed consistent and longstanding administrative constructions of the relevant statutes; none of the issues presented involves unsettled questions of federal law. Under these circumstances, the petitions present no basis for this Court's review.

KCS

1. The issues presented by KCS are simple and straightforward. First, with scarcely a mention of the D.C. Circuit's analysis (App. 27a-29a), KCS complains that the ICC erred in

refusing to grant its request for a market extension that KCS admitted has no relationship to the competitive impact of the consolidations. Pet. 9-16. See App. 243a; p. 4, above. The issue presented by KCS is thus one of transportation policy: whether, in the context of rail merger proceedings, the Commission should "act as a roving ombudsman restructuring railroads on its own." App. 29a. While KCS argues that "rove [the ICC] must" (Pet. 15), its position has no support in judicial or administrative precedent or in the relevant statutes. And there certainly is no reason for this Court to address that policy issue, which Congress and the ICC have already resolved in a manner contrary to KCS' position.

The ICC's requirement that conditions be "related to the impact of the consolidation" was developed in rulemaking proceedings addressing public interest standards for conditioning proposed consolidations. *Railroad Consolidation Procedures, General Policy Statement,* 363 I.C.C. 784, 792 (1981). For that reason, the ICC could have "barr[ed] at the threshold" KCS' request.[10] *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39 (1964); *accord, United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956). Nonetheless, the Commission evaluated the merits of KCS' proposed change in its policy and, in a thorough and well reasoned analysis, determined that such a change was not consistent with the public interest, a view shared by the Departments of Justice and Transportation. See App. 194a-197a.

In response to the unanimous conclusions of the D.C. Circuit Court, the ICC, and the Departments of Justice and Transportation, KCS argues only that denial of its requested market extensions frustrates the "procompetitive policy" of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Pet. 9. But by its very terms, the Staggers Act does not apply to applications—including those in this proceeding—that were pending before the ICC prior to October 1, 1980: such

[10] This is particularly true here, for KCS opted not to participate in the Commission's rule-making proceeding (*Railroad Consolidation Procedures, supra,* 363 I.C.C. at 784-85), even though it had an opportunity to do so after respondents' consolidation applications were filed.

applications "shall be adjudicated or determined as if this Act had not been enacted." *Id.*, § 228(e), 94 Stat. at 1934.[11] Because KCS' entire position rests on its strained reading of a statute that the ICC was not required to apply, there simply is no relevant issue presented here for review.

In any event, the substance of KCS' argument badly distorts the Staggers Act. According to KCS, "this *new* policy imposes a *new* burden on the Commission in protecting the public interest in merger proceedings." Pet. 11 (emphasis added). But the legislative history of the Act confirms that it "would make *no changes* in the present law with respect to major rail mergers: the ICC would consider such proposals under existing standards." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 120 (1980) (emphasis added), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 96th Cong. 4152. If anything, the Staggers Act's emphasis on deregulation refutes the notion that Congress intended government action to displace private initiative as the vehicle for restructuring the nation's rail system. As the D.C. Circuit Court correctly held, KCS' requests for market extensions were properly denied by the ICC. Further review of that underlying policy judgment is not warranted.

2. KCS next contends that the ICC order approving the transactions was "not approved by a majority of Commissioners." With an Alice-in-Wonderland perspective, KCS ignores the fact that five of the six ICC Commissioners enthusiastically endorsed the Decision and Order. Accordingly, this issue, which has virtually no legal substance, does not warrant further review.[12]

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[11] Even though it was not required to do so, the ICC in fact followed the Staggers Act policies in evaluating the consolidations. The ICC's opinion confirmed that "[w]hile the Staggers Act itself is not applicable to this proceeding, the policies set forth in 49 U.S.C. § 11344(b)(5) (1980) as a codification of prior law will be followed." App. 78a. Thus, the court below noted that the ICC merely "elected to adhere to . . . [the Staggers Act's] policies." App. 14a.

[12] As a preliminary matter, it bears emphasis that KCS failed to present this issue to the ICC for its consideration, thus violating its obligation to

(footnote continues)

Without reservation, three of the ICC's six Commissioners (Vice Chairman Gilliam and Commissioners Sterrett and Gradison) joined the Commission's opinion approving the transactions, subject to conditions accepted by respondents. Chairman Taylor and Commissioner Simmons each filed a concurring opinion indicating that notwithstanding his preference for additional conditions, the consolidations as conditioned by the ICC's Order are consistent with the public interest and should be approved. See p. 2 n.4, above. Thus, five of the ICC's six Commissioners endorsed the approval order.

KCS' efforts to convert these two Commissioners' affirmative votes into constructive "dissents" is refuted by the language of their opinions. Thus, addressing the principal ICC decision, Chairman Taylor concluded:

> "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward."

App. 315a.[13] *Accord,* App. 321a-322a (concurrence of Commissioner Simmons). That should put an end to this issue.[14]

(footnote continued)

exhaust administrative remedies. *E.g.,* Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 & n.15 (1946); see 49 C.F.R. § 1100.98(f) (1981). This omission is particularly egregious here because the issue presented by KCS—whether the Commission incorrectly "tallied" the votes of two of its six Commissioners—was uniquely capable of being clarified by the ICC.

[13] Chairman Taylor reiterated those views in the ICC's order, served November 18, 1982, denying various motions for stay: "[T]he Commission's conclusions and findings are correct in all material matters of fact and law." Neither he nor Commissioner Simmons dissented from that order or from the ICC's subsequent order, served November 24, 1982, again refusing to delay the approved consolidations. These votes demonstrate that there is no basis for KCS' claim that the affirmative votes of Commissioners Taylor and Simmons should be construed as dissents. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 862 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

[14] KCS' position that the Commissioners should be bound by their initial preferences for other conditions is frivolous. Union Pacific Railroad Company v. United States, 637 F.2d 764, 767 (10th Cir. 1981); *accord,* Persian Gulf Outward Freight Conference v. FMC, 361 F.2d 80, 84 (D.C. Cir. 1966).

(footnote continues)

3. As its last argument, KCS continues to press its claim that the ICC erred in calculating the precise amount of public benefits generated by the approved transactions. Pet. 19-24. While KCS couches its petition in terms of the standard of review, it seeks here merely to relitigate a variety of highly technical, quantitative issues that were tangential to the result reached by the Commission. The court below properly declined KCS' invitation to substitute its judgment on these complex issues for that of the Commission. It recognized that its obligation under the Administrative Procedure Act was not

> "to re-weigh the evidence or to draw our own inferences from the evidence before the Commission. . . . We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole." [15]

There can be no serious question that this standard was appropriate and fully consistent with this Court's precedents. *E.g., Bowman Transportation, Inc.* v. *Arkansas Best Freight System,* 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971).[16]

(footnote continued)

There is also no support for KCS' position (Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal, "collective" voting conference of the ICC. See, *e.g.,* T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777, 785-86 (S.D. Tex. 1960), *aff'd sub nom.* Herring Transp. Co. v. United States, 366 U.S. 419 (1961) (addressing notation voting system).

[15] App. 12a, *quoting* Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392, 399-400 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981).

[16] KCS fails even to acknowledge the D.C. Circuit Court's explicit discussion (App. 12a) of the standard of review. Moreover, KCS' suggestion that the D.C. Circuit applied a different standard—a so-called "independent judgment test"—is disingenous. KCS Pet. 20. The D.C. Circuit did indeed find that the ICC had exercised "independent judgment" in evaluating the administrative record. App. 24a. But that finding was directly responsive to KCS' arguments below that the ICC had not exercised independent judgment in calculating the public benefits. See, *e.g.,* KCS Br. at 51 ("The ICC's findings [are] based solely on the costing approach taken by the UP parties").

The Labor Parties

Pursuant to its statutory obligation, the ICC considered "the interest of carrier employees affected by the proposed transaction," and imposed for the benefit of displaced applicant employees substantial protective conditions. App. 276a *et seq.*; 49 U.S.C. § 11344(b)(4) (Supp. IV 1980), App. 642a; see 49 U.S.C. § 11347 (Supp. IV 1980). See also p. 4 n. 9, above. The federal courts of appeals consistently have held that these conditions, known as the *New York Dock* conditions, fully satisfy the pertinent statutes. *E.g., Brotherhood of Maintenance of Way Employees* v. *ICC*, 698 F.2d 315 (7th Cir. 1983).

The labor unions challenged below the ICC's refusal (App. 200a) to extend the *New York Dock* conditions to employees of non-applicant carriers allegedly affected by the consolidations; the Court of Appeals sustained that decision. App. 34a; *accord, Lamoille Valley Railroad Co.* v. *ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983).[17] This is by no means a novel issue. The unions have "urged [this] broader interpretation upon the Commission and reviewing courts since 1946 . . . ." *Missouri-Kansas-Texas Railroad Co.* v. *United States*, 632 F.2d 392, 411 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). In the last five years alone, the Second, Fifth and Seventh Circuit Courts, as well as the D.C. Circuit Court, have firmly and unambiguously refused to expand the scope of the *New York Dock* protections. *Id.* at 411-13 ("We affirm the Commission's view that § 11347 requires protection only for employees of the merging carriers"); see *Brotherhood of Maintenance of Way Employees* v. *ICC, supra*, 698 F.2d at 318 (the arguments "do not become more convincing by reiteration"); *New York Dock Railway Co.* v. *United States*, 609 F.2d 83, 91-101 (2d Cir. 1979). There is no reason for this Court to review this consistent and longstanding rule of law.

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[17] In *Lamoille Valley*, the D.C. Circuit Court recognized that the Commission had "consistently interpreted § 11347, since its original enactment in 1940, to exclude employees of non-applicant railroads." 711 F.2d at 323-24. In addition to recognizing the deference due this long-standing administrative interpretation, the court held that the ICC's consistent view of the statute reflected a "sensible" interpretation of its language that was "strongly support[ed]" by the legislative history, as well as "by considerations of practicality and administrative economy." *Id.*

Wheeler

The issue presented by petitioner Wheeler is essentially a factual question: whether $20 per share was a reasonable price for Western Pacific. After careful review and analysis, the ICC determined that the $20 per share "price to be paid for WPRR stock under the merger agreement is fair and reasonable." App. 298a-306a. The Court of Appeals concluded that "the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence in the record." App. 36a.[18] There is no conceivable basis for this Court to review that finding.

The underlying issue presented by Wheeler is now pending before the Chancery Court in Delaware, where dissenting Western Pacific shareholders have sought appraisal rights afforded by Delaware law.[19] Union Pacific agreed at the time of the transaction not to object to dissenting shareholders' pursuing whatever appraisal remedies they might have under state law. See *Schwabacher* v. *United States,* 334 U.S. 182, 201 (1948). Therefore, even if the ICC, the Court of Appeals, Western Pacific's management and Salomon Brothers all erred in concluding that the price was fair, dissenting shareholders who pursue their remedies in Delaware presumably would not be "deprive[d] . . . of just and reasonable compensation for [their] property," as Wheeler alleges. Pet. 6.[20]

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[18] The "substantial evidence" to which the Court referred included the opinion of Salomon Brothers, Western Pacific's financial advisers, that the price was fair (App. 298a-299a), and the fact that the $20 per share offer represented a 38 percent premium over the market price for Western Pacific stock on the day before public announcement of the transaction (App. 305a). In addition, the ICC had valued the shares of Western Pacific at $10 per share only a year before the agreement. See Newrail Co.-Purchase-Western Pacific R.R., 354 I.C.C. 885, 890, 893, 899-901 (1978). Wheeler was Western Pacific's counsel in *Newrail,* where he urged the ICC to endorse the $10 per share valuation. See *id.* at 885.

[19] Rogers, *et al.* v. Western Pacific Railroad Co. and Union Pacific Railroad Co., C.A. No. 7274 (Del. Ch. Ct., Newcastle County); Bruno v. Western Pacific Railroad Co., C.A. No. 7250 (Del. Ch. Ct., Newcastle County).

[20] Under Delaware law, shareholders exercising such appraisal rights are entitled to receive the "fair value" of their equity. Del. Code Ann., tit. 8,

(footnote continues)

Wheeler's petition selectively repeats the points that he advanced below, where he argued that the ICC had unreasonably disregarded Western Pacific's land holdings in evaluating the fairness of Union Pacific's tender offer. Pet. 6-12. But as the Court of Appeals recognized, the "Commission did not simply disregard WP's landholdings. Rather, it stated that such holdings are relatively unimportant in the context of the [capitalized earnings] methodology the Commission used in determining a reasonable range of prices for WP's stock." App. 37a; see App. 302a-303a. And, as the court also acknowledged, the capitalized earnings approach has been used in many prior proceedings to evaluate the reasonableness of proposed transactions.[21] While Wheeler contends that this approach represents a departure from prior Commission practice (Pet. 9-12), his claim is wrong, as demonstrated by the very authorities on which he relies. See, *e.g.*, *Seaboard Air Line Railroad Co. —Merger—Atlantic Coast Line*, 320 I.C.C. 122, 190 (1963) ("the physical values of the railroad properties are not controlling, for under the Schwabacher principle, the predominant factor is the earnings of the properties rather than their values"); see Pet. 9.

The Court of Appeals correctly recognized that

> "although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

(footnote continued)

§ 262 (a) (Supp. 1981). Fair value is determined by taking into consideration all the elements of value. Application of Delaware Racing Ass'n, 42 Del. Ch. 175, 206 (Del. 1965). Recently, in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983), the Delaware Supreme Court endorsed a "liberal approach [to appraisal proceedings which] must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court . . . ."

[21] App. 37a, citing Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 361-62 (2d Cir. 1979) and Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247-49 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977).

App. 37a-38a, quoting *Northern Lines Merger Cases*, 396 U.S. 491, 520 (1970). This is particularly true in circumstances, such as those presented here, where the reviewing court has affirmed the agency's finding that the transaction was the result of "arm's length negotiations" (App. 37a). This Court should reject Wheeler's invitation further to review the Commission's factual determination that $20 per share was a fair price for the Western Pacific stock.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

WILLIAM J. MCDONALD
345 Park Avenue
New York, New York 10154

JAMES V. DOLAN
PAUL A. CONLEY, JR.
1416 Dodge Street
Omaha, Nebraska 68179

CHARLES A. MILLER*
GREGG H. LEVY
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Corporation, *et al.*

* Counsel of Record

APPENDIX

APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Corporation, Missouri Pacific Railroad Company, and The Western Pacific Railroad Company:

Alameda Belt Line
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Bear Creak Uranium Company
The Belt Railway Company of Chicago
Black Butte Coal Company
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Carbon County Coal Company
Central California Traction Company
Chicago and Western Indiana Railroad Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
Milne Point Pipeline, Inc.
Oakland Terminal Railway
The Ogden Union Railway and Depot Company
Point Arguello Pipeline, Inc.

Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railraod Company
Southern Illinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Uinta Development Company
Union Pacific Resources Ltd.